

IN THE MATTER OF THE POST OFFICE LIMITED
COMPLAINTS AND MEDIATION SCHEME

Instructions to Leading Counsel
to Advise in Conference

Documents

1. Leading Counsel has herewith:
 - a) Second Sight Briefing Report Part I (Interim Report) and Briefing Report Part II
 - b) Post Office Limited Press Releases
 - c) Overview of the Complaint Review and Mediation Scheme
 - d) Scheme Working Group Terms of Reference
 - e) Correspondence between James Arbuthnot MP and Paula Vennells (Chief Executive)
 - f) Justice for Subpostmasters Alliance letter to Working Group (14 November 2014)
 - g) Relevant Hansard Extract

Background

2. In Spring 2012, Post Office Limited (POL) appointed Second Sight (SS), a firm of forensic accountants, to undertake an independent review of a number of cases in which subpostmasters (SPMRs) claimed that losses incurred in their branches (and for which they are contractually liable to POL) were the product of a fault with Horizon, the information technology platform for double entry bookkeeping used in all 11,800 Post Office branches.
3. The review was initiated following a meeting between a number of Members of Parliament, convened by James Arbuthnot MP, and senior POL representatives including its Chairman and Chief Executive. The SPMR campaign was, and continues to be, spearheaded by 'Justice for Sub-Postmasters Alliance (JFSA), an independent organisation "established to raise awareness of the problems around the Post Office Horizon system". JFSA is not a trade union body.
4. The relevant terms of the Second Sight review were to examine and advise upon: "whether there are any systemic issues and/or concerns with the Horizon system, including training and support processes, giving evidence and reasons for the conclusions reached". Second Sight published their interim report on 8 July 2013. The report was 'interim' since they were under pressure from MPs to publish but had not been able to complete their review of any of the cases they had been considering.

The Scheme

5. On the day the report was published Post Office issued a press notice and announced, *inter alia*:

"the creation of a working party to work collaboratively to complete the review of cases started by Second Sight last year. This would [sic] examine the themes identified by Second Sight and consider all cases brought forward by the JFSA and MPs, together with any new themes which emerge from these cases."
6. On 26 August 2013, POL made a further announcement and created the Initial Complaint Review and Mediation Scheme (the Scheme), the objective of which was "to address the concerns raised by some sub-postmasters regarding cases which they feel require further resolution".

7. A Working Group comprising Post Office, JFSA and Second Sight was established to develop and monitor the Scheme, which opened to applications from SPMRs (Applicants) on 27 August. Sir Anthony Hooper was appointed as its independent Chair in October 2013 on the recommendation of JFSA and accepted by POL.

8. POL agreed to fund the entire cost of the Scheme administration in addition to which, it has also made £1,500 (plus VAT) available to each Applicant in order that they might solicit the assistance of professional advisers in formulating their complaints against POL.

Scheme operation and findings to date

9. In short order, the process by which cases pass through the Scheme is as follows:

- a) Applicants to the Scheme submit a summary of their case to SS and POL
- b) POL investigates each case comprehensively afresh
- c) The results of that new investigation are passed, along with any available evidence, to Second Sight for review and to determine whether to recommend the case for mediation, exercising an independent and professional view
- d) The Working Group considers the SS recommendation and before coming to a formal decision as to whether a case is indeed suitable for mediation on the basis of a vote each for POL and JFSA and a casting vote for the Chair
- e) Those cases which are recommended for mediation are then passed to the Centre for Effective Dispute Resolution
- f) However, it has been understood and accepted by all parties from the start, that the parties concerned (POL and the relevant applicant) are entirely free to decide whether in fact they will or will not proceed to mediate

10. POL has completed a full re-investigation in 114 of the 146 cases in Scheme and will have completed this phase of the work in all cases by 22/12/2014. None of these cases has established evidence whatever of a flaw in the Horizon system. While POL is mindful of the need to avoid complacency, its confidence in the integrity of the system is high, and it considers the risk of any of the remaining cases bucking that clear trend to be low.

11. Candidly, almost all cases point pretty conclusively (or beyond any reasonable doubt) to the complacency, incompetence and/or dishonesty of Applicants as the cause of the losses incurred in the relevant post offices. In cases of incompetence, the contract for services between POL and SPMRs provides that the latter is liable to make good those losses. In cases involving criminality by the SPMR, POL makes a decision on prosecution. There is a limited number of cases in which POL considers that it might have provided better support or advice to the relevant subpostmaster or in which extenuating circumstances (for instance theft by a third party) suggest that some limited compensation, either in the form of direct payment or the writing off of debt in the subpostmaster's favour, might be appropriate.

12. POL's approach to the Scheme, as directed by its Board in the Summer of this year, has been to take a firm and proactive line rigorously to adhere to the Terms of Reference and defend its position on each case in the Scheme, with decisions on mediation being based on our understanding of the legal position on responsibility/liability for the losses and a desire to control costs and timescales. It is also worth noting that POL has received very strong legal advice not to engage in mediation in cases involving criminal convictions since to do so would carry unacceptable risks for it as the prosecuting authority. The decision to adopt this approach was taken in the context of an understanding that it would likely attract criticism from JFSA.

Recent Developments

13. The Scheme, while imperfect in its design, as well as being costly to administer and has, until recently, broadly done what it was designed to do. However, it has now become clear that SS, whose analytical ability already leaves much to be desired, has adopted a position to recommend all cases for mediation, regardless of the available evidence (including guilty pleas and subsequent convictions of significant number of Applicants for false accounting and/or theft). POL assumes that SS has come under considerable pressure from JFSA and the MPs to adopt this stance. This leaves POL in the invidious position of having to challenge an even greater number of recommendations from SS, even where it ought to be plain that it would be unreasonable, perhaps even irrational, for it to take a different course.

14. Moreover, it is now appears that, as POL has asserted its position, and in the absence of evidence of flaws within the Horizon system, JFSA has become increasingly frustrated that its expectations are not being met in terms of POL mediating all cases, accepting responsibility and paying compensation. This dissatisfaction has manifested itself in a number of ways, including a blanket refusal by JFSA to discuss the merits of any cases in which SS recommend mediation with POL in the context of the Working Group, on the basis that the SS recommendation should be determinative. This refusal extends to JFSA leaving the room in which the Working Group is meeting for this item on the agenda, rendering what POL considers to be a substantial and important part of the process and the Working Group almost entirely moribund. This also leaves the Working Group's Chair without the benefit of the necessary JFSA counter-arguments and vote on individual cases leaving him in an entirely unsatisfactory and rather exposed position.

15. Leading Counsel may also wish to note that it appears that the strict confidentiality, both of the mediations and the business of the Working Group, which all parties agreed to as a binding obligation appears to have all but broken down. There is clear evidence that JFSA and Applicants routinely discuss their cases and what transpires in the Working Group with third parties.

Watershed moment

16. The Scheme now finds itself at a watershed moment, precipitated by what appears to be a campaign by JFSA, and fronted by the MPs, to force a change in POL's approach to the Scheme. This was confirmed when, in effect, the MPs summoned POL to a meeting in the Commons on 17 November. The meeting was attended for POL by its Chief Executive, together with its Corporate Affairs Director, General Counsel and the lead POL investigator on the Scheme.

17. At that meeting, a reasonably clear threat was made that, should POL not agree to mediate all cases which SS recommend for mediation, effectively without regard to their substantive merits or the existence of any relevant convictions, MPs would expose this as a matter of bad faith in a media campaign against POL, presumably in order to force it to do so. The meeting concluded with the CEO indicating that she was not minded to make any concession of that nature and would certainly not be doing so without first consulting the POL Board among others. MPs are aware that the POL Board meets next on Wednesday 26 November and we assume they will, accordingly, expect a substantive response shortly thereafter.

18. Both ahead of the meeting and immediately after it, POL and the Working Group have started to receive correspondence relating to the Scheme, some from other MPs, some from Applicants' professional advisers and all effectively seek to assert that POL has agreed, or must now agree, to mediate all cases which SS recommend for mediation. Of particular note is the letter sent by JFSA to the Working Group in anticipation of the 17 November meeting and included with these Instructions.

Current thinking

19. While a series of alternative options for moving forward were worked up, POL has formed the view that it will not be making any concession of this nature. It will instead inform the MPs that, having established and engaged with the Scheme in good faith and gone to very significant lengths to facilitate its work, POL's position remains that the Scheme is working as it ought to and intends to proceed accordingly. This, in effect, represents a re-confirmation of the earlier direction of the Board over the Summer.

20. POL, of course, anticipates that this will produce a forcefully expressed response. It seems to POL that there are likely two alternative scenarios.

21. On the one hand, POL may find that it has rather called its interlocutors' bluff and, on sober reflection, that they may reluctantly come to the conclusion that, while the Scheme is not producing the cause célèbre (perhaps a wrongful conviction) or the compensation they might have wished for, it is in fact their only vehicle in seeking the resolution to the cases in the Scheme other than resorting to litigation. On the other hand, it may produce an immediate rejection of the Scheme and a refusal to take any further part in it. Both scenarios would almost certainly involve an attempt to use the media to paint POL in a poor light. It is also possible that attempts may be made to use Parliamentary Procedure (for instance Questions in the House) to the same end.

22. Should the second of these scenarios indeed materialise, POL will need to take a decision as to how to proceed. This would, of course, represent a departure from the current arrangements. This is also likely to be true in the first scenario, given that levels of trust and co-operation between the members of the Working Group are such that it may be extremely challenging and potentially unworkable, to operate the current arrangements. It is these decisions on which Leading Counsel's views are sought.

23. POL anticipates that, in these circumstances, it will take a decision to complete its investigation in each case and move the governance and management of the Scheme in-house (ending SS' current role and dissolving the Working Group). For the avoidance of doubt, having completed all investigations, POL will, where it is fair reasonable to do so, engage in discussions with individual applicants to resolve their complaint, including where appropriate through negotiated settlement payments or the writing off of debts in the Applicant's favour. POL would look favourably upon the retention of an independent oversight function role as it takes this work forward, in the interests of transparency and public confidence. That function may need to be performed by SS as a result of the assurance offered of their continued involvement in the Scheme offered by the Minister in the House. POL stresses its determination to resolve the issues first raised with it in Spring 2012 fairly and in the spirit of good faith which it has demonstrated to date.

24. Leading Counsel should note that POL has been working on the assumption that any decision by it to vary the Scheme could leave it susceptible to Judicial Review. It is for this reason that, notwithstanding the unsatisfactory (though workable) nature of the operation of the Scheme to date, it has not previously sought to vary the terms on which it was originally established. However, in view of the recent developments highlighted in these instructions, POL considers it necessary to revisit this question so that it might be prepared in the event that its hand is forced and to enable the Board to make decisions on next steps on the basis of robust legal advice.

Questions

Leading Counsel is asked to advise:

- a) Insofar as POL may be a public body amenable to judicial review and exercising both public law and private law functions, are the decisions it takes in relation to the Scheme a matter of public or private law;
- b) Should Leading Counsel consider the answer to a) above is private law, to what extent might the Court take the view that its decisions in this area are not amenable to judicial review or, conversely, that despite the private law nature its decisions in this matter, exercise its discretion and find that those decisions are nonetheless amenable to judicial review in the public interest;
- c) Assuming that POL's decisions in this matter risk being amenable to judicial review, what is the likelihood of an interested party being successful in obtaining permission to mount such a challenge;
- d) Should such a challenge indeed be mounted, what timings might apply, what are its likely prospects of success, and what would the Court be most likely to direct in terms of any remedy; and
- e) More generally.